

Jul 06, 2021

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

LEE L.,<sup>1</sup>

Plaintiff,

vs.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 4:20-cv-05120-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 19, 20

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 19, 20. The parties consented to proceed before a magistrate judge. ECF No. 6. The Court, having reviewed the administrative record and the parties' briefing,

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<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

1 is fully informed. For the reasons discussed below, the Court denies Plaintiff's  
2 motion, ECF No. 19, and grants Defendant's motion, ECF No. 20.

### 3 **JURISDICTION**

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

### 5 **STANDARD OF REVIEW**

6 A district court's review of a final decision of the Commissioner of Social  
7 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
8 limited; the Commissioner's decision will be disturbed "only if it is not supported  
9 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
10 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a  
11 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159  
12 (quotation and citation omitted). Stated differently, substantial evidence equates to  
13 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and  
14 citation omitted). In determining whether the standard has been satisfied, a  
15 reviewing court must consider the entire record as a whole rather than searching  
16 for supporting evidence in isolation. *Id.*

17 In reviewing a denial of benefits, a district court may not substitute its  
18 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,  
19 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one  
20 rational interpretation, [the court] must uphold the ALJ's findings if they are

1 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674  
2 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an  
3 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless  
4 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”  
5 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s  
6 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
7 *Sanders*, 556 U.S. 396, 409-10 (2009).

#### 8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within  
10 the meaning of the Social Security Act. First, the claimant must be “unable to  
11 engage in any substantial gainful activity by reason of any medically determinable  
12 physical or mental impairment which can be expected to result in death or which  
13 has lasted or can be expected to last for a continuous period of not less than twelve  
14 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be  
15 “of such severity that he is not only unable to do his previous work[,] but cannot,  
16 considering his age, education, and work experience, engage in any other kind of  
17 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
18 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential analysis to  
20 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §

1 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work  
2 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial  
3 gainful activity," the Commissioner must find that the claimant is not disabled. 20  
4 C.F.R. § 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis  
6 proceeds to step two. At this step, the Commissioner considers the severity of the  
7 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from  
8 "any impairment or combination of impairments which significantly limits [his or  
9 her] physical or mental ability to do basic work activities," the analysis proceeds to  
10 step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy  
11 this severity threshold, however, the Commissioner must find that the claimant is  
12 not disabled. *Id.*

13 At step three, the Commissioner compares the claimant's impairment to  
14 severe impairments recognized by the Commissioner to be so severe as to preclude  
15 a person from engaging in substantial gainful activity. 20 C.F.R. §  
16 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the  
17 enumerated impairments, the Commissioner must find the claimant disabled and  
18 award benefits. 20 C.F.R. § 416.920(d).

19 If the severity of the claimant's impairment does not meet or exceed the  
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
2 defined generally as the claimant's ability to perform physical and mental work  
3 activities on a sustained basis despite his or her limitations, 20 C.F.R. §  
4 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's  
6 RFC, the claimant is capable of performing work that he or she has performed in  
7 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is  
8 capable of performing past relevant work, the Commissioner must find that the  
9 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of  
10 performing such work, the analysis proceeds to step five.

11 At step five, the Commissioner considers whether, in view of the claimant's  
12 RFC, the claimant is capable of performing other work in the national economy.  
13 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner  
14 must also consider vocational factors such as the claimant's age, education and  
15 past work experience. *Id.* If the claimant is capable of adjusting to other work, the  
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §  
17 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis  
18 concludes with a finding that the claimant is disabled and is therefore entitled to  
19 benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.  
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
4 capable of performing other work; and (2) such work “exists in significant  
5 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,  
6 700 F.3d 386, 389 (9th Cir. 2012).

### 7 **ALJ’S FINDINGS**

8 On November 8, 2017, Plaintiff applied for Title XVI supplemental security  
9 income benefits alleging a disability onset date of June 22, 2016.<sup>2</sup> Tr. 15, 80, 167-  
10 75. The application was denied initially, and on reconsideration. Tr. 97-101, 105-  
11 08. Plaintiff appeared before an administrative law judge (ALJ) on August 28,  
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14 <sup>2</sup> Plaintiff previously applied for Title II and Title XVI benefits on January 3, 2014;  
15 the application was denied initially and on reconsideration, and resulted in a June  
16 21, 2016 unfavorable decision from an ALJ. Tr. 51-69. Plaintiff appealed the  
17 decision to the Appeals Council and then to this Court; the appeal resulted in a  
18 judgment for the Commissioner of the Social Security Administration. *See Lee L.*  
19 *v. Comm’r of Soc. Sec.*, No. 4:17-cv-05170-JTR (E.D. Wash. Feb. 12, 2019), ECF  
20 Nos. 17, 18.

1 2019. Tr. 28-50. On September 25, 2019, the ALJ denied Plaintiff's claim. Tr.  
2 12-27.

3 At step one of the sequential evaluation process, the ALJ found Plaintiff has  
4 not engaged in substantial gainful activity since November 8, 2017. Tr. 18. At  
5 step two, the ALJ found that Plaintiff has the following severe impairments: kidney  
6 disease, diabetes mellitus, hypertension, obesity, affective disorder, and anxiety  
7 disorder. *Id.*

8 At step three, the ALJ found Plaintiff does not have an impairment or  
9 combination of impairments that meets or medically equals the severity of a listed  
10 impairment. Tr. 19. The ALJ then concluded that Plaintiff has the RFC to perform  
11 light work with the following limitations:

12 [Plaintiff] can never climb ladders, ropes or scaffolds, work at  
13 unprotected heights or in proximity to hazards. [Plaintiff] can  
14 perform work in which exposure to extreme heat, humidity and/or  
15 vibration is not present. In order to meet ordinary and reasonable  
16 employer expectations regarding attendance, production, and work  
17 place behavior, [Plaintiff] can understand, remember and carry out  
18 unskilled, routine and repetitive work that can be learned by  
19 demonstration, and in which tasks to be performed are predetermined  
20 by the employer.

Tr. 21.

At step four, the ALJ found Plaintiff is able to perform her past relevant  
work as a hand sander. Tr. 22. The ALJ did not make an alternative step five  
finding. Therefore, the ALJ concluded Plaintiff was not under a disability, as

1 defined in the Social Security Act, from the date of the application through the date  
2 of the decision. *Id.*

3 On May 26, 2020, the Appeals Council denied review of the ALJ's decision,  
4 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes  
5 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

## 6 ISSUES

7 Plaintiff seeks judicial review of the Commissioner's final decision denying  
8 her supplemental security income benefits under Title XVI of the Social Security  
9 Act. Plaintiff raises the following issues for review:

- 10 1. Whether the ALJ properly applied *Chavez*;
- 11 2. Whether the ALJ properly evaluated the medical opinion evidence;
- 12 3. Whether the ALJ conducted a proper step-two analysis; and
- 13 4. Whether the ALJ properly evaluated Plaintiff's symptom claims.

14 ECF No. 19 at 5.

## 15 DISCUSSION

### 16 A. *Chavez*

17 Plaintiff contends the ALJ erred in his application of *Chavez*. ECF No. 19 at  
18 8-10. "The principles of res judicata apply to administrative decisions, although  
19 the doctrine is applied less rigidly to administrative proceedings than to judicial  
20 proceedings." *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1998) (citing *Lyle v.*



1 *Sec’y of Health and Human Servs.*, 700 F.2d 566, 568 n.2 (9th Cir. 1983)). Under  
2 the doctrine of res judicata, a prior, final determination of nondisability bars  
3 relitigation of that claim through the date of the prior decision. *Lester v. Chater*,  
4 81 F.3d 821, 827 (9th Cir. 1995). Furthermore, in the Ninth Circuit, a prior, final  
5 determination of nondisability “create[s] a presumption that [the claimant]  
6 continued to be able to work after that date.” *Id.* (citation and internal quotation  
7 marks omitted).<sup>3</sup> “However, the authority to apply res judicata to the period  
8 *subsequent* to a prior determination is much more limited.” *Id.* (emphasis in  
9 original). “The claimant, in order to overcome the presumption of continuing  
10 nondisability arising from the first administrative law judge’s findings of  
11 nondisability, must prove ‘changed circumstances’ indicating a greater disability.”  
12 *Chavez*, 844 F.2d at 693 (citation omitted). Examples of changed circumstances  
13 include “[a]n increase in the severity of the claimant’s impairment,” “a change in  
14 the claimant’s age category,” and a new issue raised by the claimant, “such as the

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16 <sup>3</sup> Acquiescence Ruling (AR) 97-4(9) explains how *Chavez* differs from the Social  
17 Security Administration’s (SSA) interpretation of Social Security policy requiring  
18 de novo review of claims for unadjudicated periods. The SSA applies the *Chavez*  
19 presumption only as to claimants residing in the Ninth Circuit. AR 97-4(9),  
20 available at 1997 WL 742758 at \*3.

1 existence of an impairment not considered in the previous application.” *Lester*, 81  
2 F.3d at 827-28 (citations omitted); *see also* Acquiescence Ruling (AR) 97-4(9),  
3 available at 1997 WL 742758 at \*3.

4 On June 21, 2016, a prior ALJ found Plaintiff was not disabled. Tr. 51-69.  
5 The ALJ in the present decision found Plaintiff rebutted the presumption of  
6 continuing nondisability, because Plaintiff changed age categories and alleged an  
7 impairment that was not previously considered. Tr. 16. However, the ALJ found  
8 the newly submitted evidence was not material to the outcome of the case, and as  
9 such the ALJ gave effect to the prior decisions findings of Plaintiff’s RFC,  
10 education, and work experience. *Id.* An adjudicator must adopt a finding which  
11 was made in a final decision by an ALJ or the Appeals Council under the same title  
12 of the Act unless there is new and material evidence related to the finding.  
13 HALLEX 1-5-4-60.

14 The ALJ noted Plaintiff alleged only one new impairment that was not  
15 alleged in the prior application. Tr. 18. The ALJ found that while Plaintiff was  
16 diagnosed with breast cancer, the impairment did not meet the twelve-month  
17 durational requirement and thus the evidence related to Plaintiff’s breast cancer  
18 diagnosis was not material to the decision. *Id.* The ALJ further found that Plaintiff  
19 did not demonstrate a material change in any of the conditions that existed at the  
20

1 time of the prior decision, including kidney disease, diabetes, hypertension,  
2 obesity, affective disorder, and anxiety disorder. Tr. 21.

3 First, Plaintiff contends the ALJ erred in giving effect to the prior RFC,  
4 because Plaintiff was diagnosed with breast cancer during the unadjudicated  
5 period. ECF No. 19 at 8-9. However, the ALJ reasonably found Plaintiff's breast  
6 cancer did not meet the duration requirement, and was therefore not a severe  
7 impairment. Plaintiff was diagnosed with breast cancer in August 2017, and she  
8 underwent a lumpectomy in September 2017, followed with chemotherapy that  
9 concluded by March 2018. Tr. 18. In September 2018, a mammogram indicated  
10 there was no evidence of malignancy. *Id.* As such, the ALJ's finding that  
11 Plaintiff's breast cancer was not a severe impairment, because it did not meet the  
12 duration requirement, is supported by substantial evidence. Plaintiff does not  
13 argue that she demonstrated a material change in any of her other conditions. As  
14 Plaintiff did not present new and material evidence related to her RFC, the ALJ did  
15 not error in giving effect to the prior RFC.

16 Next, Plaintiff argues the ALJ erred in giving effect to the prior findings  
17 regarding Plaintiff's employment history. ECF No. 19 at 9. Plaintiff's work as a  
18 hand sander was found to be a light unskilled job. Tr. 22, 64. Plaintiff argues her  
19 past work has been repeatedly mischaracterized as a hand sander, when Plaintiff  
20 actually worked as a machine sander, a medium exertion job. ECF No. 19 at 10.

1 However, Plaintiff previously argued to this Court that her work was incorrectly  
2 labeled as a light hand sander position and should have been labeled a medium  
3 machine sander position, and this Court found there was not substantial evidence to  
4 support Plaintiff's argument. *See Lee L.*, No. 4:17-cv-05170-JTR (ECF No. 18 at  
5 13-15). This Court found that while the ALJ erred in concluding that Plaintiff  
6 performed the sander job at a light level, the error was harmless as the vocational  
7 expert testified the position is generally performed at a light level. *Id.* The law of  
8 the case doctrine applies in the Social Security context. *Stacy v. Colvin*, 825 F.3d  
9 563, 567 (9th Cir. 2016). Under the law of the case doctrine, a court is precluded  
10 from revisiting issues which have been decided—either explicitly or implicitly—in  
11 a previous decision of the same court or a higher court. *Hall v. City of Los*  
12 *Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). The doctrine of the law of the case  
13 “is concerned primarily with efficiency, and should not be applied when the  
14 evidence on remand is substantially different, when the controlling law has  
15 changed, or when applying the doctrine would be unjust.” *Stacy*, 825 F.3d at 567.

16 The issue Plaintiff raises regarding her hand sander job was explicitly  
17 decided in the previous decision by this Court. Plaintiff now argues there is new  
18 evidence that her past work as a hand sander was medium exertion because she  
19 testified that she lifted up to 50 pounds in the position and she testified she used an  
20 electric sander. ECF No. 19 at 9. Plaintiff submitted an incomplete work history

1 report, in which she did not describe her sander position, for the present  
2 application. Tr. 201-22. Plaintiff wrote “you should have all my work history it  
3 hasn’t changed.” Tr. 222. As such, Plaintiff conceded that the previously  
4 submitted work history was accurate. While Plaintiff argues her testimony that the  
5 job required lifting up to 50 pounds is new and material evidence, Plaintiff gave  
6 identical testimony at the prior hearing and completed a work history form stating  
7 the work required lifting 50 pounds. *See Lee L.*, No. 4:17-cv-05170-JTR (ECF No.  
8 11-6 at 37, ECF No. 18 at 13-14). At the prior hearing, Plaintiff’s counsel asked  
9 the expert if a different DOT label would be more appropriate because Plaintiff  
10 lifted 50 pounds in the role, and the expert testified that the light DOT description  
11 was the appropriate job label, although Plaintiff performed the work at a medium  
12 level. Tr. 63. Plaintiff also contends there is new evidence as she testified her  
13 hand numbness makes it difficult to use a sander. ECF No. 19 at 9. However, the  
14 ALJ’s finding that Plaintiff’s neuropathy was non-severe is supported by  
15 substantial evidence for the reasons discussed *infra*.

16 Plaintiff also argues there is now new evidence she used an electric sander  
17 and did not sand by hand. ECF No. 21 at 2-3. However, the evidence in the prior  
18 case included a work history form in which Plaintiff reported using machines,  
19 tools, or equipment, and she described using equipment, including a sprayer. *See*  
20 *Lee L.*, No. 4:17-cv-05170-JTR (ECF No. 11-6 at 37). Further, Plaintiff did not

1 specifically testify that she used an electric sander in her prior job; rather, Plaintiff  
2 testified she lives with her sister and has tried to show her how to use an electric  
3 sander, and the vibration makes it hard to hold the sander. Tr. 40. As such, the  
4 evidence in this case is not materially different from the prior case and the Court  
5 declines to relitigate this issue. Plaintiff is not entitled to remand on these grounds.

### 6 **B. Medical Opinion Evidence**

7 Plaintiff contends the ALJ erred in his consideration of opinions of Ying  
8 Zhuo, M.D., and Debra Baylor, M.D. ECF No. 19 at 11-14.

9 As an initial matter, for claims filed on or after March 27, 2017, new  
10 regulations apply that change the framework for how an ALJ must evaluate  
11 medical opinion evidence. *Revisions to Rules Regarding the Evaluation of*  
12 *Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20  
13 C.F.R. § 416.920c. The new regulations provide that the ALJ will no longer “give  
14 any specific evidentiary weight...to any medical opinion(s)...” *Revisions to Rules*,  
15 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §  
16 416.920c(a). Instead, an ALJ must consider and evaluate the persuasiveness of all  
17 medical opinions or prior administrative medical findings from medical sources.  
18 20 C.F.R. § 416.920c(a) and (b). The factors for evaluating the persuasiveness of  
19 medical opinions and prior administrative medical findings include supportability,  
20 consistency, relationship with the claimant (including length of the treatment,

1 frequency of examinations, purpose of the treatment, extent of the treatment, and  
2 the existence of an examination), specialization, and “other factors that tend to  
3 support or contradict a medical opinion or prior administrative medical finding”  
4 (including, but not limited to, “evidence showing a medical source has familiarity  
5 with the other evidence in the claim or an understanding of our disability  
6 program’s policies and evidentiary requirements”). 20 C.F.R. § 416.920c(c)(1)-  
7 (5).

8 Supportability and consistency are the most important factors, and therefore  
9 the ALJ is required to explain how both factors were considered. 20 C.F.R. §  
10 416.920c(b)(2). Supportability and consistency are explained in the regulations:

11 (1) *Supportability*. The more relevant the objective medical evidence  
12 and supporting explanations presented by a medical source are to  
13 support his or her medical opinion(s) or prior administrative medical  
14 finding(s), the more persuasive the medical opinions or prior  
15 administrative medical finding(s) will be.

16 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
17 administrative medical finding(s) is with the evidence from other  
18 medical sources and nonmedical sources in the claim, the more  
19 persuasive the medical opinion(s) or prior administrative medical  
20 finding(s) will be.

1 20 C.F.R. § 416.920(c)(1)-(2). The ALJ may, but is not required to, explain how  
2 the other factors were considered. 20 C.F.R. § 416.920(c)(2).<sup>4</sup> However, when  
3  
4

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5 <sup>4</sup> The parties disagree over whether Ninth Circuit case law continues to be  
6 controlling in light of the amended regulations. ECF No. 19 at 10-14; ECF No. 20  
7 at 7; ECF No. 21 at 6-10. The Court finds resolution of this question unnecessary  
8 to the disposition of this case. “It remains to be seen whether the new regulations  
9 will meaningfully change how the Ninth Circuit determines the adequacy of [an]  
10 ALJ’s reasoning and whether the Ninth Circuit will continue to require that an ALJ  
11 provide ‘clear and convincing’ or ‘specific and legitimate reasons’ in the analysis  
12 of medical opinions, or some variation of those standards.” *Gary T. v. Saul*, No.  
13 EDCV 19-1066-KS, 2020 WL 3510871, at \*3 (C.D. Cal. June 29,  
14 2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at \*3  
15 (W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is mindful that it must defer  
16 to the new regulations, even where they conflict with prior judicial precedent,  
17 unless the prior judicial construction ‘follows from the unambiguous terms of the  
18 statute and thus leaves no room for agency discretion.’” *Gary T.*, at \*3 (citing *Nat’l*  
19 *Cable & Telecomms. Ass’n v. Brand X Internet Services*, 545 U.S. 967, 981-82  
20 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58 (2d Cir. 1993) (“New regulations



1 two or more medical opinions or prior administrative findings “about the same  
2 issue are both equally well-supported ... and consistent with the record ... but are  
3 not exactly the same,” the ALJ is required to explain how “the other most  
4 persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.  
5 § 416.920c(b)(3).

6 *1. Dr. Zhuo*

7 On November 17, 2017, Dr. Zhuo, Plaintiff’s treating oncologist, rendered  
8 an opinion on Plaintiff’s functioning. Tr. 524-26. Dr. Zhuo diagnosed Plaintiff  
9 with breast cancer, which required treatment with chemotherapy. Tr. 525. Dr.  
10 Zhuo opined Plaintiff’s breast cancer, and the treatment of her condition, cause  
11 severe limitations in Plaintiff’s ability to lift, carry, handle, push, pull, reach, stoop,  
12 and crouch. *Id.* Dr. Zhuo further opined Plaintiff was unable to meet the demands  
13 of even sedentary work, and opined the limitations were expected to last three  
14 months. Tr. 526. The ALJ found Dr. Zhuo’s opinion was supported by Dr. Zhuo’s  
15 relationship with Plaintiff, and consistent with the ALJ’s finding that Plaintiff’s  
16 breast cancer was non-severe because it did not meet the durational requirement.  
17 Tr. 21-22.

18 \_\_\_\_\_  
19 at variance with prior judicial precedents are upheld unless ‘they exceeded the  
20 Secretary’s authority [or] are arbitrary and capricious.’”).

1 The ALJ noted he was persuaded the opinion regarding Plaintiff's  
2 limitations was only an assessment of Plaintiff's short-term functioning and not  
3 Plaintiff's longitudinal functioning. Tr. 22. Temporary limitations are not enough  
4 to meet the durational requirement for a finding of disability. 20 C.F.R. §  
5 416.905(a) (requiring a claimant's impairment to be expected to last for a  
6 continuous period of not less than twelve months); 42 U.S.C. § 423(d)(1)(A)  
7 (same); *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir.  
8 2008) (affirming the ALJ's finding that treating physicians' short-term excuse  
9 from work was not indicative of "claimant's long-term functioning").

10 Plaintiff argues the ALJ erred in finding Dr. Zhuo's opinion related only to  
11 short-term functioning, because Dr. Zhuo opined Plaintiff was unable to work due  
12 to the side effects of treatment. ECF No. 19 at 12 (citing Tr. 525). However, Dr.  
13 Zhuo specifically opined the limitations were expected to last three months. Tr.  
14 526. Plaintiff further argues her side effects of treatment meet the duration  
15 requirement. ECF No. 19 at 12-13. While receiving chemotherapy in December  
16 2017, Plaintiff was experiencing Grade I peripheral neuropathy. *Id.* (citing Tr.  
17 444). In January 2018, Plaintiff was noted as having only mild, intermittent  
18 numbness/tingling in her hands. Tr. 447. Plaintiff notes she experience fatigue,  
19 back pain, and dizziness in June 2018, lists her other medical conditions, and  
20 argues she testified she had frequent swelling in her legs which can be a side effect

1 of treatment, but does not cite to objective evidence that she had ongoing side  
2 effects from treatment that lasted 12 months or longer. ECF No. 19 at 12-13. The  
3 ALJ noted there were not ongoing reports of neuropathy after Plaintiff's  
4 chemotherapy ended, Plaintiff's neurological examinations and reports were  
5 generally negative, and Plaintiff did not report edema nor fatigue after she  
6 completed chemotherapy. Tr. 18 (citing, e.g., Tr. 426, 434, 589, 606, 614). The  
7 ALJ's finding that Dr. Zhuo's opinion pertained only to short-term limitations is  
8 supported by substantial evidence.

9       2. *Dr. Baylor*

10       On March 22, 2018, Dr. Baylor, a State agency medical consultant, rendered  
11 an opinion on Plaintiff's functioning. Tr. 89-91. Dr. Baylor opined that by August  
12 7, 2018, Plaintiff would be able to perform light work in which she lifted/carried  
13 20 pounds occasionally and 10 pounds frequently, stood/walked up to six hours in  
14 a day and sat for up to six hours in a day, occasionally climbed  
15 ladders/ropes/scaffolds, avoided even moderate exposure to extreme heat and  
16 hazards, and avoided all exposure to humidity and vibration. Tr. 90-91. The ALJ  
17 found Dr. Baylor's opinion was supported by the evidence and generally consistent  
18 with the prior ALJ's RFC finding. Tr. 22. The ALJ noted that there were minor  
19 deviations between Dr. Baylor's opinion and the RFC, and stated that to the extent  
20 the opinion is consistent with the RFC, he finds it persuasive. *Id.*

1 While Dr. Baylor opined Plaintiff must avoid any exposure to vibration, Tr.  
2 90, the ALJ limited Plaintiff only to avoiding extreme vibration, Tr. 21. The ALJ  
3 did not give any explanation for not including the vibration limitation in the RFC.  
4 Defendant argues Dr. Baylor's opinion related to short-term limitations that do not  
5 meet the durational requirement, because Plaintiff's symptoms resolved in less  
6 than 12 months. ECF No. 20 at 8. Although the ALJ did not explicitly state  
7 portions of Dr. Baylor's opinion, including the vibration limitation, were rejected  
8 because they did not meet the duration requirement, any error is harmless because  
9 the ALJ explained elsewhere in the decision why the prior RFC was given effect.  
10 *See Molina*, 674 F.3d at 1115.

11 The ALJ found there was not new and material evidence that demonstrated a  
12 decline in Plaintiff's functioning since the prior decision. Tr. 21. The ALJ found  
13 Plaintiff's breast cancer and neuropathy were non-severe conditions because they  
14 did not meet the duration requirement. Tr. 18, 21. While Dr. Baylor opined that  
15 Plaintiff had severe neuropathy, and projected Plaintiff would be limited to no  
16 vibration one year after the onset date, Tr. 90-91, the ALJ found Plaintiff's  
17 neuropathy was non-severe, Tr. 18. The ALJ noted Plaintiff did not have ongoing  
18 complaints of neuropathy. *Id.* Plaintiff points to Dr. Baylor's statement that  
19 Plaintiff had severe neuropathy, Tr. 89-91, but does not point to objective evidence  
20 of ongoing limitations caused by neuropathy. Rather, the evidence cited by

1 Plaintiff consists entirely of Plaintiff's hearing testimony in which she reported  
2 neuropathy symptoms, and a medical record in which Plaintiff indicated she had  
3 only mild intermittent numbness/tingling in her hands. ECF No. 19 at 4-9.  
4 Further, even if the ALJ erred in rejecting Dr. Baylor's opinion that Plaintiff is  
5 limited to no exposure to vibration, Plaintiff has not demonstrated that any error is  
6 harmful. The ALJ found Plaintiff capable of performing her past work as a hand  
7 sander, which require no exposure to vibration. *See* Selected Characteristics of  
8 Occupations Defined in the Revised Dictionary of Occupation Titles, U.S.  
9 Department of Labor, DOT 761.687-010, 1991 WL 680441. Plaintiff is not  
10 entitled to remand on these grounds.

### 11 **C. Step Two**

12 Plaintiff contends the ALJ erred at step two by failing to identify her  
13 neuropathy as a severe impairment. ECF No. 19 at 14-15. At step two of the  
14 sequential process, the ALJ must determine whether claimant suffers from a  
15 "severe" impairment, i.e., one that significantly limits her physical or mental  
16 ability to do basic work activities. 20 C.F.R. § 416.920(c).

17 To establish a severe impairment, the claimant must first demonstrate that  
18 the impairment results from anatomical, physiological, or psychological  
19 abnormalities that can be shown by medically acceptable clinical or laboratory  
20 diagnostic techniques. 20 C.F.R. § 416.921. In other words, the claimant must

1 establish the existence of the physical or mental impairment through objective  
2 medical evidence (*i.e.*, signs, laboratory findings, or both) from an acceptable  
3 medical source; the medical impairment cannot be established by the claimant's  
4 statement of symptoms, a diagnosis, or a medical opinion. 20 C.F.R. § 416.921.

5 An impairment may be found to be not severe when "medical evidence  
6 establishes only a slight abnormality or a combination of slight abnormalities  
7 which would have no more than a minimal effect on an individual's ability to  
8 work...." Social Security Ruling (SSR) 85-28 at \*3. Similarly, an impairment is  
9 not severe if it does not significantly limit a claimant's physical or mental ability to  
10 do basic work activities; which include walking, standing, sitting, lifting, pushing,  
11 pulling, reaching, carrying, or handling; seeing, hearing, and speaking;  
12 understanding, carrying out and remembering simple instructions; use of judgment,  
13 responding appropriately to supervision, coworkers and usual work situations; and  
14 dealing with changes in a routine work setting. 20 C.F.R. § 416.922(a); SSR 85-  
15 28.<sup>5</sup>

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18  
19 <sup>5</sup> The Supreme Court upheld the validity of the Commissioner's severity  
20 regulation, as clarified in SSR 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54  
(1987).

1 Step two is “a de minimus screening device [used] to dispose of groundless  
2 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “Thus, applying  
3 our normal standard of review to the requirements of step two, [the Court] must  
4 determine whether the ALJ had substantial evidence to find that the medical  
5 evidence clearly established that [Plaintiff] did not have a medically severe  
6 impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687  
7 (9th Cir. 2005).

8 The ALJ found Plaintiff’s neuropathy was not a severe impairment. Tr. 18.  
9 The ALJ noted Plaintiff reported only mild, intermittent neuropathy in her hands at  
10 the end of a chemotherapy cycle. *Id.* (citing Tr. 441). Plaintiff did not have  
11 ongoing complaints nor treatment for neuropathy. Tr. 18. Medical records  
12 indicate Plaintiff had “mild neuropathy” and she would be closely monitored for  
13 further neuropathy symptoms. Tr. 407. Plaintiff reported no numbness or tingling  
14 at multiple appointments, Tr. 366, 381, 426, 434, although she reported numbness  
15 at some appointments, Tr. 441, 447. In her function report, Plaintiff reported no  
16 difficulty using her hands. Tr. 228. Plaintiff does not point to any objective  
17 evidence of limitations caused by her neuropathy that were not accounted for in the  
18 RFC. As such, Plaintiff has not demonstrated a harmful error. Plaintiff is not  
19 entitled to remand on these grounds.  
20

1       **D. Plaintiff's Symptom Claims**

2       Plaintiff faults the ALJ for failing to rely on reasons that were clear and  
3 convincing in discrediting her symptom claims. ECF No. 19 at 15-17. An ALJ  
4 engages in a two-step analysis to determine whether to discount a claimant's  
5 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at \*2.  
6 "First, the ALJ must determine whether there is objective medical evidence of an  
7 underlying impairment which could reasonably be expected to produce the pain or  
8 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).  
9 "The claimant is not required to show that [the claimant's] impairment could  
10 reasonably be expected to cause the severity of the symptom [the claimant] has  
11 alleged; [the claimant] need only show that it could reasonably have caused some  
12 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

13       Second, "[i]f the claimant meets the first test and there is no evidence of  
14 malingering, the ALJ can only reject the claimant's testimony about the severity of  
15 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
16 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
17 omitted). General findings are insufficient; rather, the ALJ must identify what  
18 symptom claims are being discounted and what evidence undermines these claims.  
19 *Id.* (quoting *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th  
20 Cir. 2002) (requiring the ALJ to sufficiently explain why it discounted claimant's



1 symptom claims)). “The clear and convincing [evidence] standard is the most  
2 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,  
3 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,  
4 924 (9th Cir. 2002)).

5 Factors to be considered in evaluating the intensity, persistence, and limiting  
6 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
7 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
8 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
9 side effects of any medication an individual takes or has taken to alleviate pain or  
10 other symptoms; 5) treatment, other than medication, an individual receives or has  
11 received for relief of pain or other symptoms; 6) any measures other than treatment  
12 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
13 factors concerning an individual’s functional limitations and restrictions due to  
14 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §  
15 416.929(c). The ALJ is instructed to “consider all of the evidence in an  
16 individual’s record,” to “determine how symptoms limit ability to perform work-  
17 related activities.” SSR 16-3p, 2016 WL 1119029, at \*2.

18 The ALJ found that an analysis of Plaintiff’s symptom claims was  
19 unnecessary because the evidence supplied by Plaintiff was not material to the  
20 determination and thus the prior RFC was adopted. Tr. 21. Plaintiff contends the

1 ALJ rejected Plaintiff's symptom claims as inconsistent with the objective medical  
2 evidence. ECF No. 19 at 16. However, the ALJ was not required to analyze  
3 Plaintiff's symptom claims. A Plaintiff's symptom allegations are a subordinate  
4 finding to other findings, including the RFC. *See* HALLEX 1-5-4-60. As the ALJ  
5 adopted the prior decision's RFC, the ALJ was not required to analyze Plaintiff's  
6 symptom claims. *See id.* Plaintiff is not entitled to remand on these grounds.

### 7 **CONCLUSION**

8 Having reviewed the record and the ALJ's findings, the Court concludes the  
9 ALJ's decision is supported by substantial evidence and free of harmful legal error.

10 Accordingly, **IT IS HEREBY ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.

12 2. Defendant's Motion for Summary Judgment, **ECF No. 20**, is

13 **GRANTED.**

14 3. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

15 The District Court Executive is directed to file this Order, provide copies to  
16 counsel, and **CLOSE THE FILE.**

17 DATED July 6, 2021.

18 *s/Mary K. Dimke*

19 MARY K. DIMKE

UNITED STATES MAGISTRATE JUDGE